

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TAE-SI KIM and JIN-SUNG HONG,

Plaintiffs,

v.

ADAM B. KEARNEY, et al.,

Defendants.

2:09-CV-02008-PMP-GWF

ORDER

Presently before the Court is Defendants RE/MAX Extreme, Edward C. Reed, and Barbara P. Reed's ("Reed Defendants") Motion for Leave to File Motion for Summary Judgment on Plaintiffs' Remaining Common Law Claims and Motion for Reconsideration (Doc. #285), filed on September 27, 2012. Plaintiffs Tae-Si Kim and Jin-Sung Hong filed an Opposition (Doc. #303) on October 29, 2012. The Reed Defendants filed a Reply (Doc. #305) on November 8, 2012.

Also before the Court is Defendants Richard L. Tobler, Esq. and Richard L. Tobler, Ltd.'s ("Tobler Defendants") Motion for Reconsideration (Doc. #286), filed on September 27, 2012. Plaintiffs filed an Opposition (Doc. #302) on October 29, 2012. The Tobler Defendants filed a Reply (Doc. #304) on November 8, 2012.

I. Motion for Leave to File Motion for Summary Judgment/Motion for Reconsideration (Doc. #285)

The Reed Defendants move for leave to file a summary judgment motion and for reconsideration based on intervening Nevada Supreme Court authority. Specifically, the Reed Defendants argue that after the Court's prior Orders (Doc. #85, #213) and after the applicable scheduling order's summary judgment deadline, the Nevada Supreme Court issued Davis v. Beling, 278 P.3d 501 (Nev. 2012). The Reed Defendants contend Davis clarified that a plaintiff cannot bring common law claims against a real estate licensee based on conduct which is covered by Nevada Revised Statutes §§ 645.252-.254. The Reed Defendants argue that all of Plaintiffs' remaining common law claims overlap with conduct covered by §§ 645.252-.254 because these claims rest on false representations or failures to disclose, and the statutory sections cover a real estate licensee's duties respecting disclosure. The Reed Defendants therefore move for reconsideration and for summary judgment on Plaintiffs' remaining common law claims.

Plaintiffs respond that Defendants have not shown diligence in moving to amend the scheduling order because the Davis decision was issued in June 2012, but the Reed Defendants did not move for reconsideration until September 27, 2012. Plaintiffs also assert they will be prejudiced by having to respond to the late-filed motion because they have relied on the Court's prior Orders on this subject. On the merits, Plaintiffs contend that Davis does not preclude all common law claims against real estate licensees, and that Plaintiffs' fraudulent misrepresentation claims should not be precluded. Alternatively, Plaintiffs argue that if their common law claims are precluded, their common law claims should be converted to statutory claims. Plaintiffs also contend that if the Court allows the Reed Defendants to late-file the motion to reconsider, then the Court should allow Plaintiffs the opportunity to file dispositive motions past the scheduling order deadline as well.

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1 The Reed Defendants have shown good cause for amending the scheduling order.
2 AmerisourceBergen Corp. v. Dialysist W., Inc., 465 F.3d 946, 952 (9th Cir. 2006); Fed. R.
3 Civ. P. 16(b)(4). The Davis decision did not come out until after the Court issued its earlier
4 rulings and after the applicable scheduling order deadline to file dispositive motions, and
5 thus the Reed Defendants could not have met the scheduling order deadline regardless of
6 their diligence. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992).
7 Although there was a three-month period between the Davis decision and the Reed
8 Defendants' motion, the motion was filed within the time frame set for the Tobler
9 Defendants to file dispositive motions, and the Reed Defendants' motion raises questions of
10 law which the Court eventually must resolve. Any prejudice to Plaintiffs' reliance on the
11 Court's prior rulings is ameliorated through converting Plaintiffs' common law claims to
12 statutory claims, rather than by refusing to consider the Reed Defendants' motion or by
13 extending the dispositive motion deadline even further for Plaintiffs.

14 This Court previously held Nevada Revised Statutes § 645.251 did not extinguish
15 Plaintiffs' common law claims. (Order (Doc. #85) at 7; Order (Doc. #213) at 19.)
16 However, the Nevada Supreme Court subsequently held in Davis that Nevada Revised
17 Statutes § 645.251 "precludes common law claims against real estate licensees to the extent
18 that the type of conduct forming the basis of such a claim is the type of conduct proscribed
19 in NRS 645.252-645.254." Davis, 278 P.3d at 511. Section 645.251 does not shield real
20 estate licensees from all common law claims. Id. Rather, § 645.251 "displaces common
21 law forms of liability when the type of conduct complained of overlaps with the conduct
22 covered by NRS 645.252-645.254." Id.

23 Plaintiffs' remaining claims against the Reed Defendants are intentional and
24 negligent misrepresentation against Ed Reed based on the escrow, clear title, and transfer
25 misrepresentations (counts six and fourteen); constructive fraud (count thirteen); negligent
26 undertaking to perform services (count twenty); breach of fiduciary duty (count twenty-

1 three); and unjust enrichment (count twenty-eight). Plaintiffs’ intentional and negligent
2 misrepresentation claims are based on allegations Defendant Ed Reed made affirmative
3 misrepresentations or failed to disclose material information related to the real estate
4 transaction at issue. (Second Am. Compl. (Doc. #215) at 36, 40-41.) Plaintiffs’
5 constructive fraud claim also depends on allegations that the Reed Defendants
6 misrepresented or concealed facts. (Id. at 40.) This conduct overlaps with conduct covered
7 by § 645.252(1), which sets forth a real estate licensee’s disclosure obligations, including
8 disclosing “[a]ny material and relevant facts . . . which the licensee knows, or which by the
9 exercise of reasonable care and diligence should have known, relating to the property which
10 is the subject of the transaction.” Plaintiffs’ common law misrepresentation claims in
11 counts six and fourteen and constructive fraud claim in count thirteen therefore are
12 precluded under Davis.

13 Plaintiffs’ negligent undertaking claim is based on allegations the Reed
14 Defendants “failed to exercise the skill and knowledge normally possessed by members of
15 that profession or trade in good standing in similar communities.” (Second Am. Compl. at
16 44-45.) Plaintiffs’ breach of fiduciary duty claim is based on allegations that the Reed
17 Defendants acted in their own interests after having undertaken the duty of acting for
18 Plaintiffs’ benefit. (Id. at 46.) This conduct overlaps with the conduct covered by
19 § 645.254(1), which provides that a real estate licensee “[s]hall exercise reasonable skill
20 and care to carry out the terms of the brokerage agreement and to carry out his or her duties
21 pursuant to the terms of the brokerage agreement.” It also overlaps with § 645.252(2),
22 which requires the licensee to exercise reasonable care and skill with respect to all parties to
23 the transaction. Plaintiffs’ common law negligent undertaking claim in count twenty and
24 breach of fiduciary duty claim in count twenty-three therefore are precluded under Davis.

25 Finally, Plaintiffs’ unjust enrichment claim is based on allegations the Reed
26 Defendants were unjustly enriched by receiving commissions and other fees arising out of

1 the property transaction. (Second Am. Compl. at 49-50.) This conduct overlaps with
2 conduct covered by § 645.252(1)(b) and (2), and § 645.254(7), which require the licensee to
3 disclose all sources of the licensee's compensation for the transaction, that the licensee must
4 exercise reasonable care and skill with respect to all parties to the transaction, and to
5 "account for all money and property the licensee receives in which the client may have an
6 interest as soon as is practicable." Plaintiffs' common law unjust enrichment claim in count
7 twenty-eight therefore is precluded under Davis.

8 Although all of Plaintiffs' remaining common law claims against the Reed
9 Defendants are precluded under Davis and § 645.251, the proper remedy is not summary
10 judgment in the Reed Defendants' favor on these claims. Rather, as the Court suggested in
11 a prior Order, the proper remedy is to convert Plaintiffs' common law claims to statutory
12 claims. (Order (Doc. #85) at 7 ("[T]he fact that Plaintiffs mislabeled their claim as one for
13 breach of fiduciary duty rather than as one for breach of statutory duty is not fatal to their
14 claim.").) Accordingly, the Court will grant the Reed Defendants' Motion for Leave to File
15 Motion for Summary Judgment on Plaintiffs' Remaining Common Law Claims and Motion
16 for Reconsideration (Doc. #285) to the extent that Plaintiffs' common law claims in counts
17 six, thirteen, fourteen, twenty, twenty-three, and twenty-eight are converted to statutory
18 claims under § 645.257, which provides a private right of action for violations of
19 §§ 645.252-.254. The Motion is denied in all other respects.

20 **II. Motion for Reconsideration (Doc. #286)**

21 The Tobler Defendants move for reconsideration of the Court's denial of
22 summary judgment, arguing that discovery has now closed and Plaintiffs' own evidence
23 shows their claims against the Tobler Defendants are time-barred. The Tobler Defendants
24 thus request the Court to reconsider its prior Order (Doc. #272) denying the Tobler
25 Defendants' summary judgment motion. Plaintiffs respond by arguing the Court already
26 has rejected the Tobler Defendants' arguments and the Tobler Defendants offer no new

1 evidence or new law warranting a different result. Plaintiffs further argue they will be
2 prejudiced by having to respond to the Tobler Defendants' summary judgment motion, and
3 thereby incur additional costs and fees, when the Court already has rejected the motion.

4 The Court "possesses the inherent procedural power to reconsider, rescind, or
5 modify an interlocutory order for cause seen by it to be sufficient" so long as the Court has
6 jurisdiction. City of L.A., Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 885 (9th
7 Cir. 2001) (emphasis and quotation omitted). Generally, reconsideration is appropriate "if
8 (1) the district court is presented with newly discovered evidence, (2) the district court
9 committed clear error or made an initial decision that was manifestly unjust, or (3) there is
10 an intervening change in controlling law." S.E.C. v. Platforms Wireless Int'l Corp., 617
11 F.3d 1072, 1100 (9th Cir. 2010). "A motion for reconsideration is not an avenue to
12 re-litigate the same issues and arguments upon which the court already has ruled." In re
13 AgriBioTech, Inc., 319 B.R. 207, 209 (D. Nev. 2004).

14 The parties dispute the meaning of Nevada's statute of limitations for attorney
15 malpractice actions. The applicable statute, Nevada Revised Statutes § 11.207(1), provides
16 as follows:

17 An action against an attorney or veterinarian to recover damages for
18 malpractice, whether based on a breach of duty or contract, must be
19 commenced within 4 years after the plaintiff sustains damage or within
20 2 years after the plaintiff discovers or through the use of reasonable
diligence should have discovered the material facts which constitute
the cause of action, whichever occurs earlier.

21 The Tobler Defendants argue the language "whichever occurs earlier" refers to both the
22 four year period and the two year discovery period, thus providing for a four year statute of
23 repose regardless of when the plaintiff discovered or should have discovered his or her
24 claim. Plaintiffs argue "whichever occurs earlier" refers only to the two different ways the
25 two year period can be triggered, and thus a plaintiff who discovers or reasonably should
26 have discovered the material facts beyond the four year limitation period still may timely

1 bring a claim.

2 The Nevada Supreme Court has not addressed the issue. Therefore, this Court
3 must predict what Nevada would do, “using intermediate appellate court decisions,
4 decisions from other jurisdictions, statutes, treatises, and restatements as guidance.” Credit
5 Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1126 (9th Cir. 2005) (quotations
6 omitted).

7 Under Nevada law, statutory construction is a question of law for the Court.
8 Richardson Constr., Inc. v. Clark County Sch. Dist., 156 P.3d 21, 23 (Nev. 2007). The
9 Court should construe the statute to give effect to the Legislature’s intent. Id. The Court
10 begins with the statute’s plain language, giving effect to any unambiguous language. Id. If
11 the statutory language is ambiguous, the Court must “examine the statute in the context of
12 the entire statutory scheme, reason, and public policy to effect a construction that reflects
13 the Legislature’s intent.” Id. Grammar and punctuation may assist in determining the
14 correct meaning of statutory language. See Strickland v. Waymire, 235 P.3d 605, 609-10
15 (Nev. 2010); State v. Brodigan, 125 P. 699, 701 (Nev. 1912).

16 The Court concludes, based on the structure of the statute and Nevada’s
17 discussion of a similar statute, that the language “whichever occurs earlier” applies to the
18 four year and two year limitations periods such that the four year limitations period is an
19 outside limit on when a plaintiff must bring a legal malpractice claim. There is no
20 punctuation separating the four year and two year clauses from each other, suggesting the
21 “whichever occurs earlier” language modifies the entire prior clause. Further, the Nevada
22 Supreme Court described a similarly worded statute of limitations for medical malpractice
23 actions as providing for an “overall four-year period of limitation.” Gilloon v. Humana,
24 Inc., 687 P.2d 80, 81 n.4 (Nev. 1984) (discussing Nevada Revised Statutes § 41A.097,
25 which provides that “an action for injury or death against a provider of health care may not
26 be commenced more than 4 years after the date of injury or 2 years after the plaintiff

1 discovers or through the use of reasonable diligence should have discovered the injury,
2 whichever occurs first”). The Nevada Supreme Court further stated that in wrongful death
3 actions, “in most cases the death of the victim and its discovery by the heirs are
4 contemporaneous, [and thus] the four-year limitation is likely to be of less importance than
5 in actions for malpractice.” Id. In other words, because the heirs of a decedent typically
6 will actually discover or should discover the injury when the decedent dies, the two year
7 limitations period generally will “occur first” for an heir’s wrongful death action and will
8 trigger the shorter two-year limitations period.

9 The Court concludes the Nevada Supreme Court would interpret § 11.207(1) the
10 same way because § 11.207(1) uses almost identical statutory structure and language.
11 Consequently, Plaintiffs’ legal malpractice claims against the Tobler Defendants are timely
12 only if they were brought within the earliest of: (1) four years from when Plaintiffs
13 “sustain[ed] damages,” (2) two years from when Plaintiffs actually discovered the material
14 facts constituting their legal malpractice claim, or (3) two years from when Plaintiffs should
15 have discovered the material facts through the use of reasonable diligence.

16 Here, Plaintiffs allege the Tobler Defendants committed legal malpractice by,
17 among other things, failing to “include in the Option Agreement a clear obligation for Mr.
18 Reed to ensure escrow was opened in association with the acquisition of the Subject
19 Property,” failing to “undertake reasonable efforts to ensure that escrow was opened in
20 relation to Mr. Hong’s acquisition of the Subject Property,” and failing to “undertake
21 reasonable efforts to ensure that Mr. Hong . . . obtained clear and marketable title pursuant
22 to Mr. Hong’s exercise of the Option Agreement.” (Second Am. Compl. at 16.) No
23 genuine issue of material fact remains that Plaintiffs sustained damages in the spring or
24 early summer of 2006 when they paid \$315,000 to Defendant Adam Kearney (“Kearney”)
25 outside of escrow, but Kearney failed to convey clear title to the property in exchange as
26 required under the Option Agreement drafted by the Tobler Defendants. (Order (Doc.

1 #213) at 5, 7-8.) Plaintiffs did not file this action against the Tobler Defendants until
2 January 30, 2012, after the overall four-year limitations period expired. (Second Am.
3 Compl.) Even if Plaintiffs did not sustain damage until Kearney absconded with their
4 funds, Kearney testified he stopped making payment on the loan encumbering the property
5 a year later, in approximately June 2007. (Order (Doc. #213) at 8.) Plaintiffs' legal
6 malpractice claims therefore are barred by the overall four-year limitations period, even if
7 Plaintiffs did not discover their claim against the Tobler Defendants until April 2011 as
8 Plaintiffs contend.

9 Plaintiffs' legal malpractice claims in counts forty-two to forty-five¹ against the
10 Tobler Defendants are time barred. The Court therefore will grant the Tobler Defendants'
11 Motion for Reconsideration.

12 **III. CONCLUSION**

13 IT IS THEREFORE ORDERED that Defendants RE/MAX Extreme, Edward C.
14 Reed, and Barbara P. Reed's Motion for Leave to File Motion for Summary Judgment on
15 Plaintiffs' Remaining Common Law Claims and Motion for Reconsideration (Doc. #285) is
16 hereby GRANTED to the extent that Plaintiffs' common law claims in counts six, thirteen,
17 fourteen, twenty, twenty-three, and twenty-eight are converted to statutory claims under
18 Nevada Revised Statutes § 645.257. The Motion is denied in all other respects.

19 IT IS FURTHER ORDERED that Defendants Richard L. Tobler, Esq. and
20 Richard L. Tobler, Ltd.'s Motion for Reconsideration (Doc. #286) is hereby GRANTED.

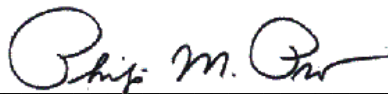
21 IT IS FURTHER ORDERED that Judgment is hereby entered in favor of
22

23 ¹ Although Plaintiffs denominate their claims as legal malpractice, breach of fiduciary duty,
24 negligent undertaking to perform services, and negligent misrepresentation, substantively Plaintiffs'
25 claims are legal malpractice claims that "would not exist but for" the alleged attorney/client
26 relationship between the Tobler Defendants and Plaintiffs. Stalk v. Mushkin, 199 P.3d 838, 843 (Nev.
2009). All of Plaintiffs' claims against the Tobler Defendants therefore are subject to § 11.207(1)'s
limitations period. Id. at 843-44.

1 Defendants Richard L. Tobler, Esq. and Richard L. Tobler, Ltd. and against Plaintiffs Tae-
2 Si Kim and Jin-Sung Hong.

3 IT IS FURTHER ORDERED that pursuant to Federal Rule of Civil Procedure
4 54(b), there is no just reason for delay in entering final judgment as between Defendants
5 Richard L. Tobler, Esq. and Richard L. Tobler, Ltd. and against Plaintiffs Tae-Si Kim and
6 Jin-Sung Hong.

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8 DATED: May 26, 2013

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10 PHILIP M. PRO
United States District Judge